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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SAIED KASHANI et al.,

Plaintiffs and Appellants,

v.

DOREEN ROCHMAN et al.,

Defendants and Appellants.

B226060 (c/w B231915)

(Los Angeles County
Super. Ct. No. BC347095)

DOREEN and JERRY ROCHMAN, as
Trustees, etc.,

Plaintiffs,

v.

SAIED KASHANI et al.,

Defendants.

(Los Angeles County
Super. Ct. Nos. BC355861,
and BC347095)

APPEALS from a judgment and an order of the Superior Court for Los Angeles County, Gregory W. Alarcon, Judge. Judgment in case No. B226060 affirmed; appeal in case No. B231915 dismissed.

Saied Kashani, in pro. per., for Plaintiffs and Appellants.

Funsten & Franzen, Mark Robertson and Don Erik Franzen for Defendants and Appellants.

The owners of an unimproved lot in the Castellammare Mesa neighborhood of Pacific Palisades -- a neighborhood governed by a Declaration of Restrictions and Conditions (the DRC), which is enforced by a homeowners association (CMHO) and its architectural committee (the AC) -- sought the approval of plans for the construction of a home on the lot. The AC required the owners, Saied Kashani and his wife, Sanaz Afsar (the Kashanis), to erect “story poles” on the lot to show the outline of the proposed construction, so the AC could determine if the proposed home would unreasonably interfere with the views from the home directly to the east of the Kashanis’ lot. That home is owned by Doreen and Jerry Rochman, as Trustees of the Rochman Family Trust (the Trustees).

The Kashanis refused to erect the story poles, in part because they claimed that doing so would require significant construction due to the steep grade of the lot. Instead, the Kashanis filed a lawsuit against CMHO, alleging claims for breach of contract, declaratory relief, and promissory estoppel (Los Angeles Superior Court case No. BC347095). After the Trustees filed a separate action against the Kashanis for declaratory and injunctive relief and/or damages (Los Angeles Superior Court case No. BC355861), the Kashanis amended their complaint to add as defendants the Trustees, as well as Doreen Rochman individually and Harvey Rochman (we will refer to Doreen Rochman and Harvey Rochman by their first names for ease of reference). The claims against Doreen and Harvey, who is Doreen’s son and also owns property in the Castellammare Mesa neighborhood, were based upon actions they allegedly took as members of the board of directors of CMHO. The Kashanis’ lawsuit and the Trustees’ lawsuit were consolidated in the trial court.

This appeal involves only the claims alleged against Doreen and Harvey, for breach of fiduciary duty and negligence. The trial court entered judgment in favor of Doreen and Harvey following their motion for summary judgment/adjudication. The court found there was no evidence that Doreen participated in any official board actions related to the Kashanis or that she improperly influenced the AC, and therefore she was entitled to judgment as a matter of law. Although the court found there was a triable issue of material fact as to whether Harvey acted in violation of his fiduciary duty or whether he was negligent, it granted summary adjudication of Doreen and Harvey's affirmative defense that they were entitled to immunity under the federal Volunteer Protection Act (42 U.S.C. §§ 14501 et seq.). The Kashanis filed a notice of appeal from the summary judgment, and Harvey filed a cross-appeal from the trial court's finding of a triable issue of fact regarding his alleged negligence and breach of fiduciary duty (case No. B226060).

In the meantime, Doreen and Harvey, together with the Trustees (who had prevailed on all of the claims alleged against them in the Kashanis' lawsuit), moved for attorney fees. The trial court denied their motion without prejudice, finding that the motion should be addressed after the Trustees' claims against the Kashanis are resolved. The Trustees, Doreen, and Harvey filed a notice of appeal from the order denying their motion (case No. B231915). We granted their motion to consolidate the appeals.

We affirm the summary judgment, although we do so on the ground that the Kashanis failed to raise a triable issue of material fact to show that Harvey and Doreen breached their fiduciary duty or were negligent as alleged in the complaint, causing damage to the Kashanis. We dismiss the appeal from the order denying the motion for attorney fees on the ground that it is not an appealable order.

BACKGROUND¹

The Kashanis own the unimproved lot located at 17642 Tramonto Drive in the Pacific Palisades area of Los Angeles, upon which they want to build a residence. The property is subject to the DRC of the homeowners association, CMHO. Under the DRC, the AC, whose members are appointed by the board of directors of CMHO, is required to review, pass upon, approve, or reject any plans or specifications for proposed construction on property subject to the DRC.

The DRC empowers the AC to reject plans for new buildings or alterations to existing buildings when the proposed height would cause unreasonable interference with views from other lots. It also provides that, “[i]n determining the location on the lot of each new dwelling or addition to an existing dwelling, reasonable effort shall be exercised to avoid obstruction of views from other lots.” The DRC requires that, if any member of the AC believes some aspect of the proposed plans may be objectionable to adjacent property owners, the AC must invite those property owners to a meeting of the AC to allow them to voice any objections they have, and the AC must “give full consideration” to those objections. The AC must give “[p]articular attention . . . to the extent that views from adjacent homes are obstructed by the proposed construction.”

A. *Events Leading Up To The Kashanis’ Lawsuit*

In May 2005, the Kashanis submitted to the AC plans and specifications for the house they sought to build on their lot. The plans called for a roof height of nine feet above the street level (the house would then extend down the slope of the lot for a total of three stories), but there was an elevator tower that would extend

¹ Our discussion of the facts will be limited to those facts relevant to the issues in this appeal, i.e., the claims alleged against Doreen and Harvey, and the motion for attorney fees filed by them and the Trustees.

eight feet above the roofline. The AC reviewed the plans, and wrote a letter to Mr. Kashani, stating that the Committee did not want to deviate above the maximum height of 14 feet, and would rather that the height of the house be increased than allow the elevator tower. Copies of the letter were sent to the owners of the homes on either side of the Kashanis' lot, including the Trustees.

In June 2005, the Kashanis submitted new plans that were identical to the May 2005 plans, except that the roof height was increased to 14 feet above street level and the elevator tower was removed. Because the revised plans called for an increase in the total height of the structure from 45 feet to 50 feet, the Kashanis would need to get a variance from the Los Angeles Department of Building and Safety. They asked Andrew Martin, a member of the AC,² if the AC would write a letter stating that CMHO did not oppose such a variance. The AC ultimately determined that it would not write such a letter because variances were not within the jurisdiction of the AC, and the AC did not want to establish such a precedent.

At some point after the Kashanis submitted the June 2005 plans, Martin told Mr. Kashani that his neighbors, the Trustees, had some concerns about the proposed plans. The Trustees had lived in the Castellammare Mesa neighborhood, on the property directly to the east of the Kashanis' lot, for more than 30 years. They had remodeled their home in 2000 to take advantage of the views of the ocean (to the south) and the Malibu coastline (to the west) from their property. The Trustees were concerned that the Kashanis' proposed house would block their views to the west. The Kashanis were asked to attend a meeting with Martin to review the proposed plans with the Trustees at the Trustees' house on August 13, 2005. At the meeting, which was also attended by Harvey and the Trustees'

² The Kashanis refer to Martin as chairman of the AC, but in fact, the chairman was Reuel Sutton, who was out of town from July to September 2005.

architect (who had provided a drawing showing the view impairment), the Kashanis were asked to erect a string line on the property to delineate the east side of their proposed house. Although Mr. Kashani objected to this request, saying that no such request had been made in his earlier conversations with another member of the AC, he ultimately agreed to erect a string line.

A few days later, Martin met with another member of the AC, Johnston, who concurred that the Trustees' architect's drawing indicated there was an unreasonable view impairment, and agreed that a string line was needed to determine the extent of the view impairment. Three days later, Martin met with a third member of the AC, Gerry Adler, at the Trustees' home to discuss the view impairment. Adler concurred with Johnston's position that no part of the west view from the Trustees' living room should be blocked, and agreed that a string line (or at the very least, a stake to identify the southeast corner of the Kashanis' proposed house) was needed to determine the view impairment. That same day, Martin telephoned the fourth member of the AC, Sutton, who was out of town. Sutton agreed that the AC should continue to require a string line or, if the erection of a string line was impossible, a stake as proposed by Adler.

On September 18, 2005, AC chairman Sutton wrote a letter to Mr. Kashani in response to a letter Mr. Kashani had written to the AC (Mr. Kashani's letter is not in the record). Sutton explained that he had been out of town for two months, and had been working on the Kashanis' plans with the neighbors for the past few days. He told Mr. Kashani that all of the neighbors had requested some sort of "mock up" of the proposed building so they could determine the potential view impairment, and that the AC was requiring this "mock up." The Kashanis did not erect any "mock up" or string line.

On January 4, 2006, Mr. Kashani sent a letter to Martin, complaining about the delay in approval of his plans, CMHO's failure to provide the letter to support

his request for a height variance, and the imposition of conditions that do not appear in the DRC. He demanded that CMHO (and/or the AC, which he refers to as “the Art Jury”) either immediately approve his June 2005 plans or, in the alternative, agree to alternative dispute resolution, in which event the Kashanis will request approval of new plans with a smaller set back on the sides.³

B. *The Kashanis’ Lawsuit*

On February 8, 2006, the Kashanis filed the instant lawsuit against CMHO, alleging damages claims for breach of contract and promissory estoppel, as well as claims for declaratory relief, related to CMHO’s failure to approve the June 2005 plans, its failure to approve the January 2006 plans, and its failure to provide the variance letter. The Trustees, Doreen, and Harvey were not named as defendants at that time.

Five months later, on July 24, 2006, the Trustees filed a separate lawsuit against the Kashanis for declaratory and injunctive relief and/or damages. The Trustees alleged that in July 2005, they told the AC and the Kashanis that the Kashanis’ proposed house would block their view of the Malibu coast from their office/study, kitchen, family room, and living room, and would obstruct the entrance of light into their office/study, which the Trustees believed would substantially reduce the value of their property. They asked that the planned construction be abandoned and/or modified, but the Kashanis refused their request. The Trustees sought an order compelling the Kashanis to refrain from building the house as planned, a declaration of their rights against the Kashanis, and damages.

³ Mr. Kashani explained that the newly revised plans have a five-foot setback, in accordance with the DRC, as opposed to the original eight-foot setback.

The trial court consolidated the Trustees' lawsuit with the Kashanis' lawsuit, on the Trustees' motion.

The Kashanis amended their complaint against CMHO in December 2006 to add the Trustees, Doreen, and Harvey as defendants. The Kashanis alleged they discovered that Doreen and Harvey were members of the CMHO board of directors at all relevant times, and that Doreen and Harvey misused their position as board members to block the Kashanis' proposed construction; they alleged that Doreen and Harvey acted negligently and in breach of their fiduciary duties. Specifically, the Kashanis alleged that Doreen and Harvey refused to recuse themselves from relevant board meetings and instead directed CMHO to (a) refuse to approve the Kashanis' submitted plans; (b) impose or continue to impose "frivolous new conditions . . . such as erection of the frame or structure on the property"; (c) refuse mediation or arbitration; and (d) refuse to entertain the Kashanis' appeal to the board. They also alleged that Doreen and Harvey did not permit the board to vote on any issue affecting the Kashanis, and that Doreen and Harvey negligently failed to investigate or consider alternatives to the mock-up requirement, such as computer images or scale models.

In April 2007, the parties stipulated to bifurcate the trial on the Kashanis' first amended complaint, and to conduct a trial on the existence or validity of the DRC first. That trial was held, and on November 30, 2007, the trial court issued its statement of decision, finding that the DRC was in full force and effect. A year and a half later, the Kashanis filed a second amended complaint (the operative complaint), which did not alter the causes of action alleged against Doreen and Harvey.

1. *Doreen and Harvey Move for Summary Judgment/Adjudication*

In November 2009, Doreen and Harvey moved for summary judgment or summary adjudication. They argued they were entitled to summary judgment because there was no evidence that they committed any of the acts alleged in the complaint, or that they caused any damage to the Kashanis. In the alternative, Doreen and Harvey argued they were entitled to judgment based upon various federal and state statutes alleged as affirmative defenses -- including the Volunteer Protection Act of 1997 (42 U.S.C. § 14501 et seq.) -- which they contended precluded liability for their conduct.

Doreen and Harvey each filed declarations in support of their motion. Doreen declared that she has been a member of the CMHO board of directors since 2005, although as of September 22, 2006, she formally recused herself from any participation in meetings of the board regarding matters relating to the Kashani lawsuit. She stated that the AC is responsible for approving or disapproving plans for construction, that the AC operates independently from the board, that she has never been a member of the AC, and that she did not direct or otherwise cause the AC (or CMHO) to refuse to approve the Kashanis' plans, or to impose or continue to impose any conditions on the Kashanis. She also stated that she did not direct or cause CMHO to refuse mediation or arbitration, or to refuse to entertain any appeal made by the Kashanis, and that she did not take charge of any CMHO board meeting or take any action to prevent the board from voting on any issue affecting the Kashanis. Doreen also declared that when she and her husband submitted their plans to the AC for the 2000 remodel of their home, the AC asked them to erect story poles so the AC could determine the impact on the views of their neighbors; they complied with the request.

Harvey declared that he was first elected to the CMHO board on February 9, 2006, after the Kashanis filed their lawsuit, and he attended a board meeting a

week later; the purpose of the meeting was to discuss the Kashanis' lawsuit. He stated that, because he was a lawyer, he agreed to help tender the Kashanis' complaint to CMHO's insurance carrier and to contact CMHO's attorney for help responding to the lawsuit pending the insurance carrier's appointment of counsel. He also forwarded to CMHO's attorney discovery subpoenas that had been directed to two board members, and reported to the board about efforts to have counsel appointed by the insurance company, as well as procedural issues related to responding to the lawsuit. He participated in a board discussion regarding the Kashanis' allegation that the AC's requirement that they erect story poles was improper, and stated during that discussion that this was a research issue, that the court would decide it in the lawsuit, and that he believed the requirement was proper. Like Doreen, he stated that the AC is responsible for approving or disapproving plans for construction, that the AC operates independently from the board, that he has never been a member of the AC, and that he did not direct or otherwise cause the AC (or CMHO) to refuse to approve the Kashanis' plans, or to impose or continue to impose any conditions on the Kashanis; in fact, he noted that the AC requested the Kashanis to erect story poles before he was elected to the board. Similarly, he also stated that he did not direct or cause CMHO to refuse mediation or arbitration, or to refuse to entertain any appeal made by the Kashanis, and that he did not take charge of any CMHO board meeting or take any action to prevent the board from voting on any issue affecting the Kashanis. He asserted that "[t]o the extent [he] was 'in charge' of anything, it was only to help the Board obtain defense counsel and respond to the lawsuit filed by the Kashanis against the Board." Finally, he stated that he formally recused himself from further participation in board meetings regarding the Kashanis' lawsuit or matters related to it as of September 22, 2006, and that he has taken no action as a board member with respect to the Kashani case since his recusal.

In addition to the above, Doreen and Harvey presented evidence that they acted as volunteers in their capacity as board members of CMHO, and that CMHO is a tax exempt “civic league,” which they asserted establishes that the Volunteer Protection Act applies to immunize them from the claims alleged against them.⁴

2. *The Kashanis’ Opposition to Summary Judgment/Adjudication Motion*

In opposing the summary judgment/adjudication motion, the Kashanis submitted, among other things, minutes of meetings of the CMHO board, as well as notes taken by board members and/or members of the AC of meetings and conversations they had with other board members and/or counsel for CMHO regarding the Kashanis’ lawsuit.⁵ They argued that this evidence showed Doreen’s and Harvey’s alleged breach of fiduciary duty and negligence.⁶ We discuss the relevant portions of those documents below.

⁴ The Volunteer Protection Act provides that a volunteer of a nonprofit organization is not liable for harm he or she caused while acting within the scope of the volunteer’s responsibilities in the nonprofit organization, so long as “the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.” (42 U.S.C. § 14503(a)(3).) The Act defines “nonprofit organization” as a tax-exempt organization described in 26 U.S.C. § 501(c)(3) (hereafter, a 501(c)(3) nonprofit) or “any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime” under the Hate Crime Statistics Act (28 U.S.C. § 534). (42 U.S.C. § 14505(4)(B).)

⁵ The trial court apparently ordered CMHO to produce documents that otherwise might be subject to the attorney-client privilege or the attorney work product doctrine after finding that CMHO had waived any objection to the Kashanis’ document requests by failing to timely respond.

⁶ The Kashanis also lodged deposition transcripts in support of their allegation that Doreen and Harvey breached their fiduciary duty and were negligent, but those transcripts are not part of the record on appeal. Nevertheless, to the extent portions of those depositions are quoted in the Kashanis’ separate statement of material facts, we

Notes from the president of the board, David Morena, about a meeting he had with Harvey on February 16, 2006 -- a little more than a week after the Kashanis filed their original complaint -- indicate that Morena consulted Harvey for his legal opinion and advice regarding the merits of the Kashanis' lawsuit and what needed to be done to respond to it. According to the notes, the "[b]asic underlying legal issue" was whether the DRC gave CMHO the right to use story poles and string lines to assess view obstruction; Harvey said this was a research issue, and that he believed the research would confirm that the board was within its rights to use story poles and string lines. The notes also indicate that Harvey discussed procedural aspects of the litigation, insurance coverage, and defense costs.

Minutes from a board meeting held a week later indicate that Harvey contacted CMHO's attorney (Murdock), provided him with a copy of the complaint, and discussed it in depth, including the "string line and view issue." Murdock recommended that CMHO tender the complaint to the insurance company, and Harvey agreed to contact the insurer. Harvey told the board that after the complaint is tendered, someone would meet with the insurance company lawyer to decide CMHO's defense. The minutes show that the board also discussed what the AC should do about the Kashanis' application now that a complaint has been filed, and concluded that nothing needed to be done at that time. During that discussion a question was raised about Harvey's involvement in the case and the possible conflict of interest it presented. According to the minutes, Harvey said that he did not think there was "a legal risk because the Board has to have independent counsel (Murdock and the insurance co.)," and

have considered them in assessing whether the Kashanis raised a triable issue sufficient to defeat summary judgment.

because there is another attorney on the board, which “can dilute the situation.” The final entry in the minutes under the heading “Kashani Suit Against CMHO” states as follows: “Should a Board sub-committee or person be assigned as ‘in charge’? Harvey agreed to continue to ‘manage’ this project for now.”

Minutes from an executive session of a board meeting held on March 13, 2006, indicate that Harvey reported that he had not gotten a response from the insurance company following his tender of the complaint, and that he would write a letter to the company on CMHO’s behalf stating that the company had a duty to defend. The minutes also indicate there was a discussion regarding CMHO’s responses to the Kashanis’ discovery requests and letters the Kashanis sent to the AC. The minutes refer to the board’s decision to have someone write a letter to the Kashanis with referrals to story pole installers, and state that Harvey and the other attorney on the board would review the AC’s “proposed procedures document” and determine who would write that letter. Notes taken by Andrew Martin at that meeting (which Martin attended as a representative of the AC) indicate that, when asked about the Kashanis’ request for mediation, Harvey said that nothing should be done before action by the insurance company.

All but one of the other references to Harvey in the notes or minutes submitted by the Kashanis related to CMHO’s attempts to respond to the Kashanis’ discovery requests. The final reference to Harvey is contained in Morena’s notes from his April 3, 2006 meeting with the attorney appointed by the insurance company to defend CMHO. Those notes state that Harvey will provide certain documents to the attorney in a day or so. Immediately following that statement is the following cryptic notation: “Harvey’s two issues . . . 1) story poles 2) variance issue.”

In their memorandum in opposition to the summary judgment/adjudication motion, the Kashanis argued that this evidence, combined with the undisputed fact

that CMHO board has the power to appoint and remove members of the AC, establish, or create a reasonable inference, that Harvey (and Doreen, who the Kashanis assert supported Harvey in everything he did on the board) exercised undue influence over the actions of CMHO. Thus, the Kashanis argued, they raised a triable issue of fact as to their breach of fiduciary duty and negligence claims. In addition, the Kashanis argued that the Volunteer Protection Act did not apply to immunize Doreen and Harvey because it protects only volunteers of a 501(c)(3) nonprofit or a nonprofit public benefit organization, and CMHO is not a 501(c)(3) nonprofit or a nonprofit public benefit organization.

3. *Trial Court's Ruling*

The trial court found that Doreen and Harvey met their burden to show that the Kashanis' claims had no merit, and that the burden shifted to the Kashanis to show that Doreen and Harvey breached their fiduciary duty or acted negligently by acting in furtherance of their interests rather than the interest of CMHO.⁷ The court found that the Kashanis met their burden as to Harvey, based upon the Kashanis' evidence that the CMHO board exercises control and the power of removal over the AC, and that Harvey "was actively involved in the Kashani story pole requirement." The court found, however, that the Kashanis presented no evidence that Doreen participated in board actions in breach of her fiduciary duty.

Addressing Doreen's and Harvey's affirmative defenses, the court found that both of them are entitled to immunity under the Volunteer Protection Act. The court found that (1) the Kashanis failed to present evidence to rebut Doreen's and Harvey's showing that the Franchise Tax Board determined that CMHO is

⁷ The court's specific findings were made in the context of the breach of fiduciary duty claim, but it noted that the same reasoning applied to the negligence claim inasmuch as the parties relied upon the same facts for both claims.

organized and operating exclusively as a civic league; (2) a civic league came within the Act's definition of "nonprofit organization"; (3) Doreen and Harvey were volunteers under the Act; and (4) the acts for which the Kashanis seek to hold Doreen and Harvey liable did not constitute willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the Kashanis.

The trial court entered judgment in favor of Doreen and Harvey (as well as the Trustees) on all causes of action in the Kashanis' second amended complaint. The Kashanis filed a notice of appeal from the judgment, and Doreen and Harvey filed a notice of cross-appeal.

In the meantime, the Trustees, Doreen, and Harvey filed a motion for attorney fees. They argued that, as prevailing parties in an action involving the parties' rights and obligations under the DRC, they were entitled to their fees under the DRC's attorney fee provision. In making their motion, they did not distinguish between the various Rochman parties or the causes of action alleged against them. The trial court denied the motion without prejudice, "finding it more appropriate to handle this issue at the conclusion of all of the litigation [i.e., after the Trustees' complaint is resolved]." The Trustees, Doreen, and Harvey timely filed a notice of appeal from the trial court's order. We subsequently granted their motion to consolidate their appeal from the order denying the motion for attorney fees with the appeal and cross-appeal from the summary judgment.

DISCUSSION

On appeal, the Kashanis contend that (1) the Volunteer Protection Act does not apply to their breach of fiduciary duty claim because it only immunizes simple negligence, and breach of fiduciary duty based on the breach of a director's duty of loyalty is an intentional tort constituting willful misconduct; and (2) the Act does

not apply to either claim because CMHO does not qualify as a nonprofit organization under the Act because it is not organized and conducted for public benefit or operated primarily for charitable purposes, and there is nothing in the Act or its legislative history to suggest it was intended to benefit homeowner associations.⁸ In their cross-appeal, Doreen and Harvey contend there is no triable issue of fact that they engaged in any conduct constituting a breach of any duty to the Kashanis. Doreen, Harvey, and the Trustees in their appeal argue that the trial court erred in denying their motion for attorney fees. We need not determine whether the Volunteer Protection Act applies because we conclude the Kashanis failed to produce evidence from which a reasonable trier of fact could conclude that Harvey breached his fiduciary duty or acted negligently as alleged in the complaint, causing damage to the Kashanis. We also conclude that the order denying without prejudice the motion for attorney fees is not an appealable order and therefore we dismiss the appeal from that order.

A. *The Summary Judgment/Adjudication Motion*

A defendant moving for summary judgment must present evidence that one or more elements of the plaintiff's claim cannot be established or that there is a complete defense to the claim. If the defendant meets that burden of production,

⁸ The Kashanis also purport to challenge the trial court's finding that they failed to raise a triable issue of fact regarding their claims against Doreen. Their argument consists of a heading and four sentences, without any citation to the record or authority. We deem that challenge to be forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived".]) In any event, we have reviewed the record and determined that the trial court correctly found that the Kashanis failed to produce any evidence of Doreen's conduct as a CMHO board member, other than her attendance at board meetings, and therefore the Kashanis failed to raise a triable issue of fact as to the claims alleged against her.

the burden shifts to plaintiff to show that a triable issue of material fact exists as to that claim or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The plaintiff shows that a triable issue of material fact exists by pointing to evidence that would allow a reasonable trier of fact to find that fact in favor of the plaintiff. (*Ibid.*) If plaintiff fails to do so, the defendant is entitled to judgment as a matter of law.

“[T]he issue on appellate review is simply whether, and to what extent, the evidence submitted for and against the motion for summary judgment discloses issues warranting a trial.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335, fn. 7.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481.)

The first step in our review requires “an analysis of the pleadings, i.e., the complaint and answer, including any affirmative defenses that may be contained therein. ‘The pleadings define the issues to be considered on a motion for summary judgment.’ [Citation.]” (*Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 122; see also *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1057 [“The propriety of summary judgment is measured against the allegations of the complaint”].)

The operative complaint in the present case alleges claims against Doreen and Harvey for breach of fiduciary duty and negligence based upon their conduct as CMHO board members, who had a conflict of interest with respect to the Kashanis’ proposed construction. Directors of a homeowners association owe a duty of undivided loyalty to the association, and may not make decisions for the association that benefit their own interests at the expense of the association and its members. (*Raven’s Cove Townhomes, Inc. v. Knuppe Development Co.* (1981)

114 Cal.App.3d 783, 799.) The complaint alleges that Doreen and Harvey breached this duty because they benefitted their interests by directing CMHO to refuse to approve the Kashanis' plans, to require the Kashanis to erect story poles, to refuse mediation, and to refuse to entertain the Kashanis' appeal to the board. In addition, the complaint alleges that Doreen and Harvey prevented the board from voting on issues affecting the Kashanis and negligently failed to investigate or consider alternatives to the story pole requirement, such as computer images or scale models.

Addressing these allegations, Harvey submitted his declaration in support of the summary judgment motion, in which he declared that he was never a member of the AC and was not a member of the CMHO board at the time the AC imposed the story pole requirement, that the decision to impose a story pole requirement was made solely by the AC, that he did not direct CMHO or the AC to refuse to approve the Kashanis' plans, entertain their appeal, or agree to mediation, and that he did not prevent the board from voting on any issues regarding the Kashanis. Thus, Harvey satisfied his burden of production on summary judgment, and we must determine whether the Kashanis presented evidence from which a reasonable trier of fact could find that Harvey did in fact direct CMHO or the AC in the manner alleged.⁹ (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

The Kashanis did not dispute that Harvey was not a member of the CMHO board at the time the AC refused to approve the Kashanis' plans and imposed the story pole requirement in August 2005. The only evidence the Kashanis presented

⁹ We need not address the showing as to Doreen in light of our conclusion that the Kashanis forfeited the issue on appeal by failing to adequately address it in their opening brief. (See fn. 8.)

of Harvey's conduct as a CMHO board member¹⁰ is found in minutes and notes from the two-month period after the Kashanis filed their lawsuit against CMHO. That evidence shows that Harvey, a lawyer, took an active role as the liaison between CMHO and its attorney, in seeking to get CMHO's insurer to defend CMHO in the lawsuit, and in gathering information and documents to respond to the Kashanis' discovery requests. This conduct does not appear to have any relation to the conduct alleged in the Kashanis' complaint.

The Kashanis point to several references in the minutes and notes, however, which they contend show that Harvey "exploited [his] directorship[] to impede the Kashanis' project." We disagree.

The first reference is to notes from board president Morena regarding a meeting he had with Harvey a week after the lawsuit was filed, during which Harvey stated his belief that research would confirm that CMHO was within its rights to require story poles. The Kashanis contend that these notes "proved the 'story poles' idea originated with the CMHO board and was championed by Harvey." They do no such thing. The notes indicate the purpose of the meeting was to discuss the Kashanis' lawsuit -- a notation at the top of the page states that the meeting was "Attorney Client Privileged" -- which sought damages against CMHO based in part on allegations that CMHO unlawfully required the Kashanis to erect a "mock up" of the proposed structure before the AC would approve the plans. No reasonable finder of fact could find that Harvey's expression of his belief that CMHO acted lawfully, in the context of assessing CMHO's response to

¹⁰ Because Harvey and Doreen are alleged to have breached their fiduciary duty and acted negligently in their capacity as members of the CMHO board, Harvey's conduct before he became a board member (or Doreen's conduct solely in her capacity as a neighbor to the Kashanis, such as when she met with members of the AC and the Kashanis at her home to discuss the Kashanis' plans) is not relevant to the summary judgment motion.

the Kashanis' lawsuit, is evidence that Harvey directed CMHO to impose the story pole requirement or to refuse to approve the Kashanis' plans.

The second reference the Kashanis point to is the notation in the minutes from the February 22, 2006 board meeting stating, "Should a Board sub-committee or person be assigned as 'in charge'? Harvey agreed to continue to 'manage' this project for now." The Kashanis assert that this notation shows that Harvey was put "in charge" of the Kashanis' application for approval of their building plans. The notation, however, appears under the heading "Kashani Suit Against CMHO," indicating that Harvey agreed only to manage CMHO's response to the Kashanis' lawsuit "for now."¹¹ It is not evidence that Harvey directed CMHO or the AC to act as alleged in the complaint.

The third reference the Kashanis rely upon is from notes taken by AC member Martin at the March 13, 2006 board meeting. Martin noted that, when asked about the Kashanis' request for mediation, Harvey said that nothing should be done before action by the insurance company. The Kashanis argue that this note shows that Harvey directed that CMHO *reject* their request for mediation, since CMHO never agreed to mediation, even after the insurance company appointed counsel for CMHO, until the trial court ordered the parties to mediate. But the Kashanis' argument ignores both the full content of Harvey's statement and the context in which it was made. As the minutes from that board meeting show, Harvey reported to the board that the lawsuit had been tendered to the insurance company but the company had not yet acted to appoint an attorney to

¹¹ The fact that the board also discussed at that meeting what action the AC should take on the Kashanis' application is not, as the Kashanis assert, evidence that the board would decide what would happen to the application. The discussion arose in the context of what the AC could or could not do in light of the lawsuit; it does not, in any event, have any bearing on whether Harvey directed any action on the part of the board or the AC to refuse to approve the Kashanis' plans or impose a story pole requirement.

defend CMHO. Another board member, Zab Mosenifar, expressed concern that mediation could be costly and that the insurance company should be involved. In this context, Harvey's statement that nothing should be done about the Kashanis' request for mediation *before action by the insurance company* cannot be interpreted to mean anything other than a suggestion that CMHO wait for the insurance company to appoint an attorney, to allow the appointed attorney to respond to the Kashanis' request.¹² A trier of fact could not reasonably infer, based upon Harvey's statement and CMHO's failure to agree to mediation after CMHO's representation in the lawsuit was turned over to the insurance company lawyer, that Harvey directed CMHO (or its lawyer) to reject the Kashanis' request for mediation. In fact, notes taken by CMHO board chairman Morena from his April 3, 2006 meeting with the attorney appointed by the insurance company indicate that Morena and the attorney discussed the possibility of agreeing to mediation, but they were concerned about getting the documents they needed to participate.

The final reference the Kashanis point to is the cryptic note taken by CMHO board chairman Morena at that same April 3, 2006 meeting. The Kashanis assert that one can infer from that note -- "Harvey's two issues . . . 1) story poles 2) variance issue" -- that the story pole requirement was "Harvey Rochman's idea." Such an inference would be speculative at best. No reasonable trier of fact could conclude, based upon that note, that Harvey directed CMHO or the AC to impose the story pole requirement, especially in light of references in notes or minutes from other meetings indicating that Harvey was going to conduct research relating to the story pole issue for purposes of the lawsuit. In short, that note does not give rise to an inference sufficient to raise a triable issue. (*O'Neil v. Dake* (1985) 169

¹² Inasmuch as "it is customary for the insurer to control the defense it provides" (*State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1429), it is not surprising that Harvey, a lawyer, suggested that CMHO wait to respond to the request for mediation.

Cal.App.3d 1038, 1044 [triable issue may be raised by inferences only if “those inferences be *reasonably deducible* from evidence, and not such as are derived from speculation, conjecture, imagination or guess work”].)

There is no doubt that the Kashanis presented evidence that raises questions regarding Harvey’s possible conflict of interest due to his participation in CMHO’s initial response to the Kashanis lawsuit. But that is not the basis for the Kashanis’ claims. The evidence does not show (or give rise to an inference) that Harvey was in any way responsible for CMHO’s or the AC’s imposition of the story pole requirement, refusal to approve the Kashanis’ plans, entertain their appeal, or agree to mediation -- the conduct upon which the claims against him are based. Therefore, Harvey is entitled to judgment as a matter of law. The judgment is affirmed.

B. The Order Denying the Motion for Attorney Fees Not Appealable

The Trustees, Doreen, and Harvey argue in their appeal (case No. B231915) that the trial court erred by denying their motion for attorney fees because they were the prevailing parties in the Kashanis’ lawsuit. The Kashanis contend the trial court’s order denying the motion is not an appealable order because the trial court denied the motion without prejudice, finding the issue must be deferred until the resolution of the Trustees’ lawsuit against the Kashanis, which had been consolidated with the Kashanis’ lawsuit. The Kashanis are correct.

Ordinarily, an order granting or denying a post-judgment attorney fee motion is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2). But the trial court here did not rule on the merits of the prevailing parties’ motion, it simply postponed its ruling. Because the minute order makes clear that the trial court contemplated further action to determine the Trustees’, Harvey’s, and/or Doreen’s right to attorney fees, the order is not appealable. (See, e.g.,

Gibson v. Savings & Loan Commissioner (1970) 6 Cal.App.3d 269, 272 [trial court’s denial without prejudice of alternative writ sought by petitioner is not appealable where trial court did not intend by its order to finally determine the rights of the parties]; *Estate of Keuthan* (1968) 268 Cal.App.2d 177, 180 [appeal from a probate court order denying without prejudice administrator’s application for payment of attorney fees and petition for decree of distribution; appellate court dismissed appeal, concluding that “[t]he words ‘without prejudice’ eliminate any binding effect that the order appealed from might have”].) Therefore, we dismiss the appeal in case No. B231915. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 [“The existence of an appealable judgment is a jurisdictional prerequisite to an appeal”].)

DISPOSITION

The judgment in case No. B226060 is affirmed; Doreen Rochman and Harvey Rochman shall recover their costs related to that appeal. The appeal in case No. B231915 is dismissed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.